

**AMERICA'S HEALTH INSURANCE PLANS
AMERICAN COUNCIL OF LIFE INSURERS
AMERICAN INSURANCE ASSOCIATION
BLUE CROSS AND BLUE SHIELD ASSOCIATION
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA**

May 27, 2008

The Honorable Sandy Praeger, President
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, MO 64108

Re: *Analysis Of State Law Confidentiality Limitations In Market Conduct
Surveillance Statutes Affecting NAIC D Committee Proposal*

Dear Commissioner Praeger:

The Market Regulation and Consumer Affairs (D) Committee of the NAIC has approved a surprising proposal calling for the collection of MCAS data (MCAS) by the NAIC through use of the NAIC Annual Statement Blank. This proposal is now pending before the NAIC Executive Committee. The implementation of this initiative would require the substantial majority of state insurance departments to violate the laws of their states. The proposal, therefore, should be rejected.

As part of their efforts to modernize and strengthen their analysis of insurers' market conduct, many state insurance departments have begun requiring preparation of MCAS reports in recent years. The NAIC has prepared formats for Life/Annuity and Property/Casualty versions of this document and, in 2004, adopted a Market Conduct Surveillance Model Law (Model 693) but the reports are currently submitted to individual states and the NAIC does not receive the data collected. Thirty states will reportedly use this market analysis tool for 2008. All states and the District of Columbia, including many jurisdictions that do not currently require submission of MCAS reports, have statutes (or, in one case, a regulation) governing the gathering of market conduct information.

The data provided in the MCAS has been treated as confidential in the great majority of states requiring its use. Now, however, the D Committee has proposed that the bulk of the reported information will routinely be made public as part of the Annual Statement Blank. Although some Commissioners have suggested that they might be willing to

consider industry petitions to treat particular data elements on the MCAS as confidential as a matter of discretionary judgment, this would not solve the problem.

The D Committee proposal to make public the data now submitted on the MCAS violates the law of the substantial majority of states. Indeed, the D Committee proposal is at odds with NAIC Model Law 693 (Market Conduct Surveillance Model Law), which is consistent with a large number of state statutes. There is no dispute that state insurance departments rely upon their market conduct surveillance statutes to require the submission of MCAS reports. Andrew Beal, Deputy Executive Vice President and Chief Legal Officer of NAIC, has stated that the current practice is “for states to use their examination authority to collect the data elements in MCAS.” (D Committee Minutes, March 31, 2008, Orlando, Florida, at p. 2.)

Yet a careful reading of the market conduct surveillance laws of the 50 states plus the District of Columbia reveals very substantial obstacles to the D Committee’s proposal. As detailed in Attachment A, in only three states, Florida, Mississippi and New York, the examination statutes do not impose confidentiality requirements on such materials or make confidentiality permissive. Notably, however, New York currently has pending legislation that would modify this structure and make such materials confidential except in limited circumstances. In an additional five states (Arizona, North Dakota, Oregon, Utah and Wisconsin), the insurance commissioner has discretion to authorize disclosure “as appropriate” or if doing so would further the “public interest”, but to our knowledge, none of those commissioners has ever done so. Indeed, Deputy Director Marks of Arizona advised the D Committee in written comments that Arizona regarded the proposal as “unworkable” precisely because of the anticipated loss of confidentiality.

In all other states beyond those eight, the law accords critical confidentiality protections to MCAS reports and similar data by statute (or in Alabama by regulation). This is not a matter of regulatory discretion. In seven states (Alabama, Delaware, Idaho, Iowa, Kansas, Kentucky and Tennessee) disclosure of *any* market conduct materials collected under the market conduct surveillance law is flatly prohibited. In 20 states, permissible disclosure is limited to the final report of the commissioner following a market conduct examination; disclosure of companies’ MCAS submissions is not authorized. In 16 states and the District of Columbia, the commissioner may disclose market conduct materials only when he or she is pursuing a particularized legal or regulatory action against a specific company. As detailed in Attachment B, in nine states (Alaska, Delaware, Michigan, Mississippi, Nevada, New York, Texas, Utah and West Virginia), the statute makes no reference to allowing disclosures to the NAIC.

Indeed, the market conduct laws are not narrowly limited to insurer *examinations*. The statutes in fourteen states (along with NAIC Model Law 693 and the NCOIL Market Conduct Surveillance Model Law) expressly provide for the confidentiality of market conduct *analysis* and the same larger scope is clearly implicit in the statutes of the remaining jurisdictions. As noted, the NAIC Model Law was adopted in 2004. That the NAIC adopted a broad model law affording strict confidentiality protection to market

conduct materials, which by definition would include the MCAS, sharply contradicts the current approach proposed by the D Committee.

The D Committee now proposes that each state retroactively disclaim reliance on its market conduct surveillance statute with, in almost all cases, confidentiality provisions. This would overturn the actions of the states that have mandated MCAS submission to date. Instead, the proposal is to require that the data provided on the MCAS data elements be “shoehorned” into the financial Annual Statement. The financial data on that Annual Statement has always been considered public, but that information is quite unlike the MCAS data. Commissioner Gross of Virginia, who chairs the NAIC Financial Condition (E) Committee, has objected to including market conduct data on the financial Annual Statement, noting that “Virginia [like other states] recently passed a statute which makes MCAS and other market analysis data confidential.” (Statement of Commissioner Alfred W. Gross, in response to NAIC Emails Dated March 21 & March 24, 2008).

The reality is that all but a handful of state legislatures have determined, following the NAIC model market conduct surveillance law, that market conduct data should be accorded a high level of confidentiality protection. Curiously, despite NAIC adoption of Model Law 693, Mr. Beal “stated [at the March 31 meeting] that there has never been a formal determination by the NAIC that the data [on the MCAS] should be considered confidential.” That statement ignores both the formal position taken by the NAIC in adopting Model Law 693 and the fact that the legislatures of most states have made that determination, precluding any role for the NAIC. Similarly, Mr. Beal stated that “*besides the examination laws currently used*, he is not aware of any laws which would prohibit centralized data collection and storage” in any but a handful of states. How can the question be framed “besides” those laws? As Director McRaith of Illinois noted on March 31, there is no other way to collect MCAS information than through the examination laws. Similarly, Commissioner Morrison of Montana, who chairs the D Committee, recognized that MCAS data has been collected under examination laws that assure that the information will remain confidential. The state insurance departments cannot disregard the rules applicable to “apples” simply by calling them “oranges.” The market conduct surveillance laws of each state cannot be implicitly repealed by an action of the NAIC Executive Committee.

It is quite clear that the great majority of states would not be able lawfully to comply with an NAIC requirement to turn over market conduct data to that organization to be made public without violating each state’s laws that such materials be kept confidential. The NAIC should not be adopting initiatives that call for its members to violate the laws of their states.

Thank you for the opportunity to provide our comments and concerns.

Very truly yours,

Marty Mitchell
Director, Product Policy
America's Health Insurance Plans

Kelly Ireland
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Deirdre Manna
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**ATTACHMENT A:
SUMMARY OF STATE STATUTORY PROHIBITIONS ON DISCLOSURE OF MARKET
CONDUCT MATERIALS IN MARKET CONDUCT SURVEILLANCE STATUTES**

STATE LAW PROHIBITS PARTICIPATION IN D COMMITTEE PROPOSAL			STATE LAW IS CONSISTENT WITH D COMMITTEE PROPOSAL	
Disclosure of Market Conduct Materials Entirely Prohibited	Disclosure is Prohibited Although Examination Report May be Made Public	Disclosure is Prohibited Except in Furtherance of a Legal or Regulatory Action	Disclosure is Permissible, In Discretion of Department	Disclosure of Market Conduct Materials is Permissible
Alabama ^{1 2}	NAIC Model Law 693	NCOIL Model Law ⁴	Arizona ²	<i>Florida²</i>
Delaware	Alaska	California ²	North Dakota	Mississippi
Idaho ²	Arkansas	District of Columbia ²	Oregon ²	<i>New York³</i>
<i>Iowa²</i>	<i>Colorado²</i>	Georgia	Utah ²	
<i>Kansas²</i>	Connecticut	Indiana	Wisconsin ²	
Kentucky ²	<i>Hawaii</i>	Louisiana ²		
Tennessee	Illinois ²	Nebraska ^{2 4}		
	Maine	Nevada		
	Maryland ²	<i>New Hampshire²</i>		
	Massachusetts	New Mexico ⁴		
	Michigan	<i>North Carolina^{2 4}</i>		
	Minnesota	Ohio ²		
	Missouri ²	Pennsylvania ^{2 4}		
	Montana ²	South Dakota ⁴		
	New Jersey ²	<i>Texas</i>		
	Oklahoma	<i>Virginia²</i>		
	Rhode Island ²	Washington ²		
	South Carolina ²	West Virginia ^{2 4}		
	Vermont			
	Wyoming			

Italics indicates those states that have enacted or significantly amended their disclosure provisions since 2004 to provide stricter confidentiality provisions or have pending legislation to do so.

¹ The prohibition under Alabama law is contained in a regulation, rather than a statutory provision. Accordingly, unlike many other states, the Commissioner could alter that situation through administrative rule-making and would not require legislation to dispose of current confidentiality requirements.

² These states are currently participating in the MCAS submission process.

³ Although the New York statute currently contains no specific provision requiring market conduct reports and materials to be kept confidential, there is pending legislation that would change that approach in line with the NAIC Model law and other jurisdictions that protect the confidentiality of such materials.

⁴ These jurisdictions allow the final examination report to be published and, in addition, allow materials to be disclosed in furtherance of a legal or regulatory action.

**ATTACHMENT B:
SUMMARY OF MARKET CONDUCT SURVEILLANCE STATUTES AND
CURRENT TREATMENT OF ALLOWING NAIC ACCESS TO INFORMATION**

NO MENTION OF NAIC	MAY SHARE WITH NAIC	MAY SHARE WITH NAIC WITH PROMISE OF CONFIDENTIALITY	MAY SHARE WITH NAIC WITH WRITTEN AGREEMENT OF CONFIDENTIALITY	MAY SHARE WITH NAIC WITH AUTHORITY TO HOLD CONFIDENTIAL
Alaska	Florida	Maryland	Alabama	Arizona
Delaware		North Carolina	Arkansas	Colorado
Michigan		Oregon	California	District of Columbia
Mississippi		Washington	Connecticut	Ohio
Nevada		Wisconsin	Georgia	Virginia
New York		Wyoming	Hawaii	
Texas			Idaho	
Utah			Illinois	
West Virginia			Indiana	
			Iowa	
			Kansas	
			Kentucky	
			Louisiana	
			Maine	
			Massachusetts	
			Minnesota	
			Missouri	
			Montana	
			Nebraska	
			New Hampshire	
			New Jersey	
			New Mexico	
			North Dakota	
			Oklahoma	
			Pennsylvania	
			Rhode Island	
			South Carolina	
			South Dakota	
			Tennessee	
			Vermont	